

Attorney Docket No.: 13105.1

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Acorn Alegria Winery,
Dba Acorn Winery

Opposer,

v.

Sweely Holdings, LLC

Applicant.

Opposition No. 91/168,790
Appln. Serial No. 78/497,107,
78/497,110, 78/497,114

**APPLICANT'S NOTICE OF
RELIANCE PURSUANT 37 CFR §
2.120(j) ON DISCOVERY
DEPOSITION**

Please take notice that Applicant, Sweely Holdings, LLC pursuant to 37 CFR § 2.120(j), is hereby noticing its reliance on and making a record of the discovery deposition of William Nachbaur dated August 22, 2006 ("Deposition"). A true copy of the Deposition transcript is attached hereto.

DATED this 12th of February 2007.

Respectfully submitted,

SWEELY HOLDINGS, LLC

By: 

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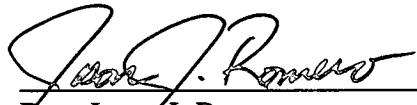
02-16-2007

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #:

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Notice of Reliance Pursuant to 37 CFR § 2.120(j)** was served on counsel for Opposer, this 12th day of February, 2007, by sending same via electronic and First Class Mail, postage prepaid, to:

Gregory N. Owen
Owen, Wickersham & Erickson, P.C.
455 Market Street, 19th Floor
San Francisco, CA 94105


By: Jason J. Romero

1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
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6 ACORN ALEGRIA WINERY,)

7 dba ACORN WINERY,)

8 Opposer,)

9 vs.)

No. 91/168,790

10 SWEELY HOLDINGS, LLC)

11 Applicant.)

12 **ORIGINAL**

13
14
15
16 DEPOSITION OF

17 WILLIAM NACHBAUR

18 SAN FRANCISCO, CALIFORNIA

19 AUGUST 22, 2006
20

21 ATKINSON-BAKER, INC.

COURT REPORTERS

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**The deponent read,
corrected, and
executed his
deposition transcript.**

24 REPORTED BY: CORAL COREY, CSR NO. 10699

25 FILE NO: A007470

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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ACORN ALEGRIA WINERY,)	
dba ACORN WINERY,)	
Opposer,)	
vs.)	No. 91/168,790
SWEELY HOLDINGS, LLC)	
Applicant.)	
_____)	

Deposition of WILLIAM NACHBAUR, taken on behalf
of Defendants, at 455 Market Street, 19th Floor, San
Francisco, California, commencing at 11:30 a.m., Tuesday,
August 22, 2006, before Coral Corey, CSR No. 10699.

A P P E A R A N C E S

FOR THE PLAINTIFF:

LAW OFFICES OF OWEN, WICKERSHAM & ERICKSON

BY: GREGORY N. OWEN, ESQUIRE

455 Market Street, 19th Floor

San Francisco, California 94105

FOR THE DEFENDANT:

LAW OFFICES OF OSBORN, MALEDON

BY: JASON J. ROMERO, ESQUIRE

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I N D E X

WITNESS: WILLIAM NACHBAUR

EXAMINATION	PAGE
BY MR. ROMERO	5

EXHIBITS	PLAINTIFF'S	PAGE
NUMBER	DESCRIPTION	
	(NONE)	

EXHIBITS	DEFENDANT'S	PAGE
NUMBER	DESCRIPTION	
	(NONE)	

QUESTIONS WITNESS WAS INSTRUCTED NOT TO ANSWER:

(NONE)

INFORMATION TO BE SUPPLIED:

(NONE)

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WILLIAM NACHBAUR,

having first been duly sworn, was
examined and testified as follows:

EXAMINATION

MR. ROMERO: Q. My name is Jason Romero. I
represent Sweely Holdings, LLC, in the opposition, trademark
opposition case brought by Acorn Alegria Winery.

Would you please state your name and spell it for
the record.

A. William T. Nachbaur.

Q. And have you ever been deposed before,
Mr. Nachbaur?

A. Yes.

Q. How many times?

A. Once.

Q. Recently?

A. No, about 16 years ago.

Q. Okay. Just for the sake of clarity, I'm going
to go over some of the basic ground rules. You probably are
familiar with a lot of these but just to help out the court
reporter here, who we thank for rushing down on short notice
for her, wait for a full question before you answer.

We'll try to speak one at a time. I'll try as well

1 not to speak over you.

2 Please give audible answers, yes or no. If you nod
3 or shake or something, I will just ask you is that a yes.
4 To clarify my questions, I will rephrase them. It's my job
5 to ask clear questions. Inevitably I will ask one that's
6 not. Go ahead and ask me to rephrase, and I'll help you out
7 with it.

8 If at any time you feel like you've forgotten
9 something in an answer or you want to go back and clarify
10 that, feel free to stop me and say, hey, can I tell you
11 something else I'd forgot to mention. That's great. Just
12 fill it in at any time.

13 And then, of course, assuming you need a break,
14 just let me know and you can finish answering the question
15 and we'll take a break and go from there. Hopefully we
16 won't go long enough so we don't need too many breaks.

17 Mr. Nachbaur, did I pronounce that right?

18 A. Yes.

19 Q. All right. Is it your understanding that you
20 are here in a representative role for Acorn Winery today?

21 A. Yes.

22 Q. In response to a Notice of Deposition received
23 by Acorn Winery?

24 A. Yes.

25 Q. What is your role and title with Acorn Winery?

1 A. I'm their president.

2 Q. President. When did you acquire that title
3 and take that position?

4 A. Well, when we created the corporation in
5 August of 1995.

6 Q. Okay. So between August of 1995 and the
7 current date, there's been no other president besides
8 yourself?

9 A. Correct.

10 Q. And as a representative of Acorn Winery, what
11 did you do to prepare for this deposition?

12 A. I skimmed through the responses to
13 interrogatories and I think I looked at one of the things we
14 submitted related to which states we're in.

15 Q. Okay. Did you hold any meetings with other
16 members of the company?

17 A. Well, the only other member of the company is
18 my wife. And I -- you know, we talk about business all the
19 time.

20 Q. So you may have discussed it with your wife?

21 A. Right.

22 Q. Okay. Did you discuss it with anyone else in
23 the company?

24 A. There is nobody else.

25 Q. There is no nobody else. Okay. Great.

1 You know, I had just one other question before we
2 get too far. I want to make sure we've covered all of the
3 bases here.

4 Mr. Nachbaur, are you currently taking any
5 medication or drugs that might affect your ability to answer
6 questions today?

7 A. No.

8 Q. And do you have any medical conditions that we
9 need to try to accommodate or that might affect your ability
10 to answer questions?

11 A. No.

12 Q. Okay. Thank you.

13 What is your educational background?

14 A. I have a bachelor's degree and a law degree
15 from U.C. Berkeley, and an LLM from George Washington
16 University in Washington, D.C.

17 Q. What was your bachelor's degree?

18 A. Political science.

19 Q. And how did you get into the wine making
20 business?

21 A. Well, I liked wine, and I liked gardening and
22 I got kind of carried away.

23 I took viticulture courses at Santa Rosa Junior
24 College courses while I was working for a vineyard and found
25 an existing vineyard and land next to it and I started

1 selling grapes, and I said why not make wine. So I started
2 making wine.

3 Q. And I assume -- I'm sorry, go ahead.

4 A. No, go ahead.

5 Q. I assume you took these classes after
6 finishing your LLM, your law school degree?

7 A. I practiced law for 16 years before.

8 Q. Okay. And I believe I read somewhere, I was
9 looking through the documents, you actually found this piece
10 of property while you were taking your classes; is that
11 right?

12 A. That's correct.

13 Q. And you were practicing, is that --

14 A. I was practicing law at the time?

15 Q. No, I'm sorry, you were practicing on this
16 property?

17 A. Oh, yes, I was actually pruning the vines
18 before I owned the property before we closed.

19 Q. And found out it was for sale and decided to
20 close?

21 When did you --

22 A. Well, no, I found out it was available and
23 then it was in escrow when I was working. It was not part
24 of the class to work on that property.

25 Q. And when did you close on that property?

1 A. March of 1990.

2 Q. Okay. And where is that property located?

3 A. It's in Healdsburg, California.

4 Q. Is there a physical address?

5 A. 12040 Old Redwood Highway. It's actually two
6 parcels. There are two addresses.

7 Q. So what's the second one?

8 A. 12050.

9 Q. And I assume there's a separate mailing
10 address for Acorn Winery?

11 A. Our mailing address is a post office box, P.O.
12 2061, Healdsburg 95448.

13 Q. And so you purchased the property in 1990.
14 When did you form the corporation?

15 A. In August of 1995.

16 Q. Were you operating the vineyard in the interim
17 between 1990 and 1995?

18 A. Yes.

19 Q. Growing grapes?

20 A. The vineyard is not part of the winery. The
21 vineyard we own directly. The winery is a corporation. Two
22 entities.

23 Q. That helps me understand.

24 So the vineyard itself, which is that Acorn Alegria
25 Vineyard; is that the --

1 A. No, the vineyard is Alegria Vineyard.

2 Q. And that's owned personally by you and your

3 wife?

4 A. That's correct.

5 Q. So it's not an asset directly owned

6 corporation Acorn Winery?

7 A. That's correct.

8 Q. So the corporation that we've been speaking

9 of, it was formed in 1995 as Acorn Winery?

10 A. That's correct.

11 Q. Who were the incorporators?

12 A. It was either myself or my wife or myself

13 alone.

14 Q. And who were the original shareholders?

15 A. My wife and myself.

16 Q. And you have remained the sole shareholders

17 throughout?

18 A. That's correct.

19 Q. Can you tell me when the -- well, and this --

20 I'm sorry, this may be a more specific question. We'll have

21 to get into it.

22 When were the vineyards planted originally?

23 A. The original vineyards were planted in 1890.

24 There's an old vineyard, eight and a half acres adjacent to

25 other plants that were planted. So we planted vines 100

1 years after the original vineyard.

2 Q. Okay.

3 A. But those old vines are still there.

4 Q. And old vines still yield fruit?

5 A. Yes.

6 Q. So they never, I guess the term would be went
7 fallow?

8 A. No. No, they -- vines -- over that 100-year
9 period, vines have died and been replaced, and we continued
10 to replace vines that died, but there are still 116-year-old
11 vines out there.

12 Q. Okay. So the original property acreage you
13 purchased was how much acreage?

14 A. It's 31 acres.

15 Q. And you said -- I'm sorry, I didn't catch how
16 many acres were the 100-year old --

17 A. Well, the original vineyard is
18 eight-and-a-half acres.

19 Q. And then you planted an additional amount of
20 acreage?

21 A. We have a total of 26 planted.

22 Q. 26 acres. And what is the remaining acreage
23 being used for?

24 A. Roads and creek, and we've planted just about
25 all we can.

1 Q. Okay. Is there a home on the property?

2 A. Yes.

3 Q. Is there also a retail outlet?

4 A. Yes.

5 Q. Is your home the retail outlet?

6 A. Well, the home and the winery and retail

7 outlet are all one building.

8 Q. And it's my understanding that people can

9 visit the property and do wine tasting?

10 A. Yes, we're open by appointment and for some

11 special events.

12 Q. Okay. All right. And when people come, do

13 they come to the, I believe it's your garage; is that where

14 the wine tasting is?

15 A. That's correct.

16 Q. Help me understand what varietals are planted

17 in your vineyard?

18 A. Well, all together, counting some table

19 grapes, we probably have 40 different varietals, but our

20 main ones are Zinfandel, which is a field blend with Petite

21 Sirah and Alicante Bouschet. Do you want me to spell that.

22 B-o-u-s-c-h-e-t.

23 And then we have Syrah, Cabernet Franc, Sangiovese,

24 Dolcetto, and those are the main ones.

25 Q. Okay. Can you give me an idea of the amount

1 of acreage or percentage that is dedicated to each of those
2 varietals, the primary varietals?

3 A. We have about 12 acres of -- or 11-and-a-half
4 acres of Zinfandel, that includes other grapes, and
5 six-and-a-half acres of Syrah, five acres of Cabernet Franc,
6 two-and-a-half acres of Sangiovese, and about nine-tenths of
7 an acre of Dolcetto.

8 Q. And the portion of the land that had been
9 planted about 100 years ago, or a little over 100 years ago,
10 what sort of varietals were planted there?

11 A. That's predominately Zinfandel, and it's in
12 what's called a field blend where different varieties are
13 planted and harvested together, cofermented. So they're
14 blended right from the day they're picked.

15 Q. What's the purpose of planting a field blend?

16 A. Well, it's kind of the old fashioned way of
17 doing it. It's, you know, kind of a pre-20th century way of
18 making wine where you didn't keep things separately, and we
19 think it makes a richer more complex wine to have the
20 different grapes interact from day one.

21 Q. Is that done fairly frequently now?

22 A. No, it's fairly unusual.

23 Q. Okay. What made you decide to operate your
24 vineyard that way?

25 A. Well, working in the old vineyard, I thought

1 about what the people who planted it must have been
2 thinking, and they were making dynamite wines. So we
3 thought, well, we should do this with other varieties too.

4 And different grapes kind of give you different --
5 fill different parts of the overall palate.

6 You know, when you're tasting a wine, you've got
7 different flavors in the front of your mouth, in the middle,
8 in the back. Sometimes another grape will kind of fill out
9 a hole in the middle, things like that.

10 Q. Interesting. Now, do you do this field blend
11 planting with all of your other varieties as well?

12 A. Yes. They're not quite as mixed up, but we --
13 like for the Cabernet Franc, we have a row of Merlot and a
14 row of Petit Verdot, the Petit doesn't have any -- I'll
15 write these all out for you

16 Q. We can correct them when the transcript comes
17 out as well.

18 A. Okay.

19 Q. All right. Just going back to Acorn Winery
20 itself, the corporation, I believe you answered this; how
21 many employees?

22 A. There is just my wife and myself, and then we
23 hire independent contractors for various things.

24 Q. In other words, to pick the grapes?

25 A. Yes, to pick the grapes, we bring people in.

1 We have an outside accountant to do the taxes.

2 Q. What is your wife's title or role with the
3 company?

4 A. She's vice president/treasurer.

5 Q. Who's in charge of keeping the records?

6 A. Well, we both do everything so.

7 Q. So it's a mix?

8 A. Right.

9 Q. Do you make wine on site there?

10 A. Yes.

11 Q. How much do you make annually on site?

12 A. Well, we have a license that lets us make up
13 to 500 cases there, and then the rest of our wine we make at
14 other wineries.

15 Q. Do you make the full 500 cases generally?

16 A. Not every year, no. No, we've made less.

17 Q. Do you have any idea how many you made, say,
18 last year?

19 A. Let me see. Probably 200 cases worth.

20 Q. And you say additional wines you have made at
21 other wineries that have excess capacity?

22 A. Uh-huh.

23 Q. Describe that process?

24 A. Well, it's kind of a fairly common practice.

25 A winery will build a plant to grow in to, and so they'll

1 have excess space and to kind of reduce their cost, they'll
2 bring in their tenants too that can use their facilities.

3 We use their crusher and press and tanks and store
4 barrels there.

5 Q. Okay.

6 A. And it's been a moveable feat. We'll go into
7 a winery that then decides they need the space and then go
8 someplace else, have to go to another winery.

9 Q. In other words, as they reach their capacity,
10 you have to find someone else?

11 A. Right.

12 Q. Now, when you do this, do you actually
13 yourself go and make the wines on site there?

14 A. No. I make use of their laborers as well. So
15 I choose the barrels and, you know, I have some input in the
16 wine making, but you know, they know what they're doing.

17 Q. Sure.

18 A. And we also have a consulting wine maker who
19 has ideas of what should be done too. So she'll tell the
20 wine maker at the facility what she wants done.

21 Q. When you send the, I guess the grapes and the
22 entire thing over to another winery to be made, do you
23 distinguish the wine that then comes from that process from
24 the wine that comes directly from your --

25 A. No.

1 Q. -- vineyard?

2 They all come out of Acorn Wines?

3 A. That's correct.

4 Q. Of various varietals?

5 A. That's correct.

6 Q. Okay. Do you --

7 A. Can I have a glass of water, please.

8 Q. Sure.

9 Do you feel like you have fairly a good amount of

10 control of the wine-making process?

11 A. Yes.

12 Q. And there's some continuity between the wines

13 that comes from you and --

14 A. 90 percent of the wine making is growing the

15 grapes. So we focus on producing really good grapes and

16 there is consistency year to year regardless of where we

17 make the wine.

18 Q. How much of your vineyard that you've planted

19 do you actually use -- let me rephrase that.

20 How much of the yield do you actually use to make

21 wines yourself or in the lease space?

22 A. About 50 percent.

23 Q. What do you do with the other 50 percent?

24 A. We sell to other wineries and some of those

25 will put our vineyard name on their label.

1 Q. So when you say they put your vineyard name,
2 they --

3 A. I mean Alegria, non Acorn.

4 Q. So they will put their own --

5 A. Their own -- you'll see a Rosenblum Alegria
6 Vineyard Zinfandel, Striker Sonoma Alegria Vineyard Cabernet
7 Franc, Ross Canyon Vineyard Syrah, so on.

8 Q. Okay. Do you get a lot of visitors to your
9 site?

10 A. It varies. If we have an event, we might get
11 1,000 people in a day or certainly on a weekend.

12 And when we don't have an event, we might have
13 around 300 people over the course of a month, but it kind of
14 depends on, you know, whether there's an event and whether
15 we're there.

16 Q. What would be an event?

17 A. There's an organization called the Russian
18 River Wine Road that has three events a year. The biggest
19 one being barrel tasting where people can come in March and
20 taste wine that hasn't been bottled yet and buy futures, you
21 know, buy wine that won't be delivered until the fall.

22 Q. Okay. So these events that occur at other
23 organizations sort of host them and bring them along to your
24 winery?

25 A. Well, the organization sponsors the event and

1 publicizes it, and then each member winery is open that day.

2 People, you know, drive from winery to winery in the area.

3 Q. Is there a -- I'm sorry.

4 A. This organization is kind of based in
5 Healdsburg. So it's the wineries around Healdsburg.

6 Q. And Russian River Valley?

7 A. Russian River Valley and Dry Creek Valley,
8 Alexander Valley.

9 Q. And during those days you stay open, it's not
10 by appointment only?

11 A. It's not by appointment then.

12 Q. When people come to your winery or your
13 vineyards, what services are offered?

14 A. I'm not clear what you mean by "services."

15 Q. Do you offer tastings?

16 A. Yes.

17 Q. Tours of the vineyard?

18 A. Yes.

19 Q. What about -- forgive my vocabulary, stomping
20 or grape crushing or pressing?

21 A. No.

22 Q. Any other sort of activities that you host?

23 A. No. We've hosted a few meals kind of maybe as
24 an auction item to raise funds for something that we would
25 agree to serve dinner for a group that bought something on a

1 silent auction to raise money for a charity or one of the
2 winery organizations.

3 Q. I see. So then they would come out to your
4 winery and have a meal and have wine with it?

5 A. Yes. And then at these events we also usually
6 have food that's catered by a local restaurant.

7 Q. Okay. The restaurant that caters, do they
8 also usually carry your wine?

9 A. Yes.

10 Q. I would hope so.

11 What wine varietals does Acorn Winery currently
12 make?

13 A. Okay. We make Zinfandel, Sangiovese, Syrah,
14 Dolcetto, Cabernet Franc, a blend called Medley, and a Rose
15 called Rosatto.

16 Q. I count seven; is that right?

17 A. Yes.

18 Q. Have you made other varietals in the past?

19 A. We have. We made a blue Portuguese one year,
20 and we've made Cinsaut a couple of years, C-i-n-s-a-u-t. We
21 made mostly a Cabernet Franc blend one year that we called
22 Mariquetta. I guess that's it.

23 Q. Okay. What caused you to stop making the
24 three you just discussed?

25 A. The Cinsaut we decided we could do better

1 selling more Dolcetto, so we grafted most of Cinsaut over to
2 Dolcetto.

3 The blue Portuguese was kind of experimental thing.
4 We only had enough grapes to make half a barrel and I got
5 some of those from another grower who ripped hers out so --

6 Q. The source disappeared on that?

7 A. Right.

8 Q. What is your -- which varieties do you sell
9 most of?

10 A. Well, it depends on the year.

11 In 2003 our biggest bottle was Cabernet Franc and
12 next was Sangiovese and probably roughly equal amounts of
13 Zinfandel and Syrah. Dolcetto was our smallest bottling,
14 and then the blend Medley is kind of in between.

15 Well, I would say the Rosatto is small too.

16 So you want me to clarify that.

17 Q. Yes, please.

18 A. Okay. The top two for '03 were Cabernet Franc
19 and Sangiovese. The next two are Zinfandel and Syrah, and
20 probably the next would be Medley, and then Dolcetto and
21 Rosatto are the smallest.

22 Q. And that was for 2003?

23 A. Right.

24 Q. Do you recall, say, last years sales?

25 A. Last years sales.

1 Q. I'm sorry, the amount of --

2 A. Well, the 2003 vintage is what we've been
3 selling in 2005 and 6 pretty much.

4 Q. And that may need some explanation for me.
5 When you say 2003, do you --

6 A. I mean the vintage date on the wine.

7 Q. Correct. Okay. And so a 2005 vintage date
8 probably isn't being sold right now?

9 A. Well, the exception is the Rose. The Rosatto
10 was a 2005. That was bottled in March and released right
11 away or released in May.

12 Q. And forgive my ignorance, why do you have a
13 delay between vintage date and sale?

14 A. Barrel aging. When you make wine, you age it
15 in barrels to smooth it out and have it pick up certain
16 characteristics from the oak barrels.

17 Q. So the amount of time it takes to age will
18 dictate when you're going to be selling that?

19 A. Right.

20 Q. Do you think that, in your opinion, there's a
21 particular wine that Acorn Winery is known for, famous for?

22 A. We are probably best known for our Zinfandel,
23 which won the sweepstakes award at the Harvest Fair, and it
24 has quite a following, because we used to sell the grapes to
25 Ridge Vineyards and Rosenblum which are leading Zinfandel

1 producers.

2 Our Sangiovese also has a following. It was just
3 judged the best Sangiovese at the California State Fair.
4 They all have their -- they all will have a following.

5 And you can talk to different people who would
6 prefer one over another, but I guess they're all good.

7 Q. It's all somewhat taste for the individual.
8 Sure.

9 A. Right.

10 Q. Let's get into some of the number side a
11 little bit here.

12 Can you give me an estimate of gross annual revenue
13 for, say, 2005?

14 A. Yes. We were just under 600,000.

15 Q. Was that an increase from 2004?

16 A. Yes.

17 MR. OWEN: May I interject here. Pursuant to our
18 confidentiality agreement we'll address the issue of what's
19 confidential after the transcript comes out.

20 MR. ROMERO: Certainly. We would be willing to
21 stipulate. Absolutely.

22 Q. Can you give me an idea of profits for 2005?

23 A. Not off the top of my head.

24 Q. There were profits?

25 A. Yes.

1 Q. It's my understanding, you can correct me if
2 I'm wrong, that generally you have to spend three or four
3 years before you can be profitable in the wine making
4 business; is that correct?

5 A. I would say at least, yes.

6 Q. And when would you say that Acorn Winery
7 became profitable?

8 A. Probably in 2004.

9 Q. Okay. You expect it to be profitable this
10 year as well?

11 A. Yes.

12 Q. In what quantities do you sell your wines?

13 A. Do you mean total cases of each variety.

14 Q. I'm sorry, I guess I mean can somebody buy a
15 bottle of your wine separately?

16 A. Yes.

17 Q. And somebody can buy it by the case?

18 A. Yes. It depends on who the somebody is. A
19 consumer can buy one bottle. A wholesale customer would buy
20 by the case.

21 Q. Somebody coming to your winery could buy a
22 bottle, I would assume?

23 A. That's true.

24 Q. Could they buy it by the glass?

25 A. No.

1 Q. So only tastings are offered?

2 A. Right.

3 Q. And you do ship or sell to individual
4 consumers?

5 A. Yes.

6 Q. How would the average individual consumer go
7 about obtaining your wine directly from you as opposed to --

8 A. They would either come to the winery or call
9 or e-mail or fax.

10 Q. Can they order directly on line?

11 A. Well, we have a website that lists -- that
12 has an order form, but it's -- we don't have a shopping cart
13 kind of situation.

14 So you would have to print the order form, fax it
15 in or send an e-mail or something like that.

16 Q. What would you say an average percentage of
17 your sales come from these direct individual consumers?

18 A. It's getting pretty close to 50 percent, I
19 think.

20 Q. And of those, what percentage come from people
21 directly coming into the winery?

22 A. I would think that most people buying directly
23 have been to the winery at some time. So our mail or phone
24 orders would be generally repeat business with people who
25 have been to the winery.

1 Q. I see. So even those that were mailing in or
2 faxing in an order most likely would have visited the winery
3 at one time?

4 A. Most likely.

5 Q. And do you sell to distributors?

6 A. Yes.

7 Q. Any idea how many distributors you sell to?

8 A. We have four right now.

9 Q. Who are they?

10 A. Well, we have -- excuse me, five.

11 We have distributors in New Hampshire, New York,
12 Washington, D.C. and Texas and Japan.

13 Q. Okay. And can you name the distributors?

14 A. In New Hampshire, they're called Wine Berries.
15 In New York, it's Gabriella Imports, and Washington, D.C.
16 it's called the Tannic Tongue, and in Houston it's, I think
17 it's B.P. Imports, and I can't think of the name of the
18 Japanese distributor. I could --

19 Q. It may very well be in the documents you
20 provided.

21 A. It might be.

22 Q. Okay. So there's five. Who is your primary
23 distributor?

24 A. Our largest customer would be Wine Berries in
25 New Hampshire.

1 Q. Okay. And, on average, what percentage of
2 your sales are to these distributors?

3 A. I would guess it's around a third.

4 Q. Okay.

5 MR. OWEN: Can I get a clarification on that
6 question. Are you asking -- he answered earlier about 50
7 percent is to customers. When you say a third, is that that
8 same relationship.

9 THE WITNESS: Yeah, I'm afraid I'm going to end up
10 with something more.

11 MR. OWEN: Could we --

12 MR. ROMERO: Right.

13 MR. OWEN: -- maybe ask the question again.

14 THE WITNESS: Well, these are just --

15 MR. ROMERO: Let me repeat the question and we'll
16 try to get the answer clarified.

17 Q. Of your total sales to anyone anywhere, what
18 percentage of the total sales is to distributors?

19 A. Well, I really don't know without looking it
20 up, but I'm thinking it's about a third or maybe less of the
21 total sales.

22 Q. And I'm not trying to trick you up on math. I
23 just want to make sure it's clear.

24 A. Well, I don't keep it in my head.

25 Q. Sure. And I'll come back to that.

1 Do you also sell directly to retailers?

2 A. Yes.

3 Q. How many retailers, do you have any idea?

4 A. No, I don't really have a number for you. Are
5 you including restaurants and retailers.

6 Q. Sure. Let's include restaurants as well.

7 A. We sell to restaurant and retail stores mostly
8 in Northern California, a few in Southern California, and
9 then out of state it's mostly through distributors.

10 So the distributors sell to retail stores and
11 restaurants.

12 Q. Who are the primary or by volume largest
13 retailers of restaurants that you sell to directly?

14 A. Well, again, I'm not sure. I could name a
15 couple. There's a store called Bottle Barn in Santa Rosa,
16 and there's another called Wine Impressions in
17 San Francisco. There's a restaurant in Healdsburg called
18 Zin. It's a pretty big customer.

19 Q. These retailers that you sell to directly,
20 we'll exclude restaurants for a moment; would you consider
21 them specialty wine shops?

22 A. Well, I'm not sure what the term means, but
23 they are shops that sell probably more wine than hard
24 liquor.

25 Q. So you don't sell to sort of mass merchants?

1 A.J.s Fine Foods, something like that directly?

2 A. No.

3 Q. And I don't have all the terminology, but I
4 assume that you would not consider your wines sort of your
5 everyday run-of-mill table wine varietal?

6 A. Well, we certainly don't think of them as run
7 of the mill, but we like people to drink them every day.

8 Q. I may have set that up poorly.

9 You would consider it a more sophisticated wine
10 than Gallo, Ernest and Julio Gallo, buy from the box sort of
11 wine?

12 A. Well, we have some customers who are very
13 sophisticated and some who don't know that Zinfandel is red
14 until they've tasted it, but we're not making jug wine.

15 Q. Who would you consider making jug wine?

16 A. Gallo is one.

17 Q. Anybody else come to mind?

18 A. I don't pay much attention to it. Franzia is
19 another one.

20 Q. It's frightening that I've heard of these.
21 All right.

22 A. Gallo also makes some high-end wine too. Not
23 just jug wine.

24 Q. Okay. They'll appreciate you saying that, I'm
25 sure.

1 How much would you say Acorn Winery spent on
2 marketing in the last year?

3 A. I think we spent about 60,000.

4 Q. And what types of marketing do you do?

5 A. We enter wines in competitions and send them
6 to reviewers. We go to public tastings. We produce
7 materials to, you know, distribute with the wine describing
8 the wine. We don't do much paid advertising but if you get
9 a good review in a wine magazine and you want to have your
10 label appear alongside the review, you have to pay for that.

11 And we've had various newspaper articles about us
12 that I guess I can't say we spent money to get that, but
13 you've got the materials we provided.

14 Q. Sure. That's sort of advertising, I would
15 assume.

16 A. Yes.

17 Q. These competitions that you enter, describe
18 that for me?

19 A. They're various county fairs and the State
20 Fair. We submit a required number of bottles, usually about
21 six bottles of each wine along with an entry fee for each
22 wine.

23 They have a panel of judges who judge wine by
24 varietal and sometimes within a varietal by price class, and
25 then they'll award medals, usually gold, silver, bronze,

1 best of class, best of show kind of thing.

2 Q. Okay.

3 A. So then if we get a gold medal, we'll use that
4 in our marketing.

5 Q. How often do you enter these competitions?

6 A. I would say we enter at least six a year, and
7 in addition send wine to wine magazines and wine news
8 letters and general circulation newspapers that have a wine
9 page.

10 Q. And the purpose behind that is to?

11 A. Is to have them review the wine and write it
12 up.

13 Q. Are the competitions generally held in
14 California?

15 A. Yes. There are others. We haven't gone out
16 of California except I think in one case that I can think
17 of.

18 Q. What was the one case?

19 A. Well, two. We entered wine in a wine
20 competition in Dallas, and one which I think was maybe in
21 the Finger Lakes area of New York.

22 Q. And I assume there's a fee to enter these
23 competitions?

24 A. Yes, a fee on virtually all of them. I think
25 Orange County is maybe the one exception.

1 Q. That they don't charge a fee?

2 A. (Witness nods.)

3 Q. So they probably get a lot of wines?

4 A. Yes.

5 Q. And you said you also do public tastings as
6 marketing?

7 A. Well, we belong to various organizations that
8 promote wine. One's called Zinfandel Advocates and
9 Producers which are almost all of the California Zinfandel
10 producers. They have a big tasting in San Francisco at the
11 end of January where, I don't know, about 500 wineries are
12 pouring 1,000 wines.

13 And we -- there's an event we do that's part of
14 that weekend where we pair our food with wine from a
15 restaurant. That's been Zin Restaurant for the last four
16 years.

17 Q. I'm sorry, pair your food?

18 A. Well, we'll have them standing next to us
19 serving some food that is intended to compliment the wine
20 and vise versa.

21 Q. Okay. Got it.

22 A. Then we're in another organization called
23 Family Wine Makers of California, and they have a similar
24 tasting. These tastings are usually for both trade and
25 consumers. Often they'll be set up. A trade comes in in

1 the morning and consumers in the afternoon. So it's an
2 opportunity to meet restaurant buyers and potentially
3 distributors and so forth.

4 Q. Okay.

5 A. As well as consumers who might follow-up with
6 an order.

7 Q. Right. Are these tastings, do you pay a fee
8 to enter those?

9 A. Oh, yes.

10 Q. And you pay fees also to the organizations?

11 A. Yes.

12 Q. Okay. And when you said you don't do much
13 paid advertising, what did you mean by paid advertising?

14 A. Well, by that I meant paying to run an ad in
15 the local paper, for example.

16 Q. Television commercial?

17 A. No television.

18 Q. Do you do any direct mailing?

19 A. Yes.

20 Q. Any idea how large your direct mailing list
21 is?

22 A. Well, we have switched pretty much to e-mail,
23 but we have sent out printed news letters, and to answer
24 your question, I don't have an idea of the size of the list.
25 I would have to look that up.

1 Q. More than 100?

2 A. Oh, yes.

3 Q. You think more than 1,000?

4 A. Yes.

5 Q. Okay. More than 10,000?

6 A. No, I don't think so.

7 Q. Ball parked it anyway.

8 So of the things that you've listed, what would you
9 consider to be the primary mode of marketing for your wines?

10 A. Well, I don't think of one as primary. We
11 feel like we have to do all of those things to get the brand
12 out there.

13 Q. Sure.

14 A. And we depend a lot on word of mouth. That
15 satisfied customers tell friends that you have to go to
16 Acorn, and neighboring wineries send people to us. So it's
17 sort of vital marketing.

18 Q. What form of marketing would you say takes the
19 most of your resources, your financial resources?

20 A. Well, probably -- again, I'm not sure. But
21 just preparing materials, you know, descriptions of the
22 wines and order forms and that sort of thing probably
23 account for the biggest chunk of it, but then these
24 competitions, you know, the entry fee, you know, they maybe
25 average \$60 per wine, per event. So if you enter six wines,

1 that adds up.

2 Q. Right.

3 A. So that's another piece of it.

4 Q. Okay. Who would you consider to be the
5 primary target of your marketing?

6 A. I guess consumers.

7 Q. When you say "consumers," you mean individual
8 consumers?

9 A. Uh-huh.

10 Q. Do you have a catalog for your wines?

11 Do you have like a mail order catalog or any sort
12 of thing like that, direct mail catalog?

13 A. We don't have anything I would call a catalog.

14 Q. Okay. And my unfamiliarity with the industry
15 may show, but are there other sort of trade shows that you
16 can attend as well?

17 A. Well, I think what I've been describing might,
18 at least the trade part of these tastings, might be
19 considered a trade show. In that I mean if the morning
20 session of one of these tastings is devoted to retailers and
21 restaurant wine buyers, is that a trade show.

22 Q. I think so. I guess it sounds like it to me.

23 A. Okay. So, yes.

24 Q. Do you ever travel out of state to market your
25 wines?

1 A. Yes.

2 Q. Where do you travel?

3 A. We travel to states where we have
4 distributors, and we have had distributors in other states
5 that we don't now, but now would mean the four states I
6 mentioned.

7 Q. Japan?

8 A. Actually we did go to Japan several years ago.
9 Not on an annual thing.

10 Q. Besides yourself and your wife, do you have
11 any sales representatives that you send out to market your
12 wines?

13 A. We, from time to time, use brokers. We have
14 two right now. One for San Francisco, and one for Sonoma
15 county.

16 Q. And a broker attempts --

17 A. And one in Orange county we just picked up.

18 Q. And a broker attempts to link your wine up and
19 have a distributor?

20 A. No. We can sell direct to retailers in
21 California. So they will go in, pour the wine for wine
22 buyer and take an order.

23 Q. And do you just hire these brokers on an
24 independent contractor basis?

25 A. And they get a commission.

1 Q. Commission. Okay.

2 Do you break down your advertising budget based on
3 the varietals you intend to advertise to anyone?

4 A. No.

5 Q. How do you decide which wines to enter into,
6 say, a competition?

7 A. Well, we might think about how the wines did
8 the previous year at that competition, and that would be a
9 factor.

10 Also, if one of the wines gets a gold medal in an
11 earlier competition, we may decide not to enter another one.

12 So if we have a gold medal, we can talk about, the
13 marketing. Then why spend the money on another competition.

14 Q. And know where to go from there?

15 A. Right.

16 Q. Sure. You know, one thing I didn't follow-up
17 on with respect to the vineyard; what size is the yield from
18 your vineyard as far as grapes?

19 I think they probably measure that in tonnage of
20 grapes, would that be --

21 A. We get about 100 tons of grapes.

22 Q. From your vineyard?

23 A. From our vineyard.

24 Q. So of that 100 tons --

25 A. We're taking about half, and that has

1 increased over time. We started off maybe just 10 percent.

2 Q. Okay.

3 A. And now it's approximately 50 percent.

4 Q. And the other 50 percent you say you sell to
5 other wineries?

6 A. That's correct.

7 Q. And these wineries will place just the
8 vineyard name on the bottle, on their bottle?

9 A. Yes, with our permission.

10 Q. They're not required to?

11 A. No. They need to get our approval.

12 Q. I see. And how many of the wineries that you
13 sell have approval to indicate the vineyard?

14 A. Well, the way we've set it up is they're
15 supposed to check with us each year, so you know, it's not a
16 blanket approval.

17 Q. I see. So it's a year-to-year reaffirmation
18 of?

19 A. And again, this doesn't relate to the Acorn
20 brand.

21 Q. Right. This is Alegria solely. Gotcha.

22 Tell me just for a minute about in 2003 you changed
23 the name of your corporation?

24 A. Yes.

25 Q. What were the circumstances?

1 A. Well, with this -- I mentioned that we're
2 doing this making wine at other wineries, which is called
3 custom crushing. And it was my understanding of the
4 B.A.T.F. rules that -- well, back up.

5 Under the B.A.T.F. rules you have to list the
6 bottling location on the back, and so if we're bottling at
7 X,Y,Z, winery, they could have a dba that says Acorn, but we
8 couldn't use -- give them the right to use Acorn Winery as a
9 dba if that was our corporate name.

10 So we had to change the corporate name to allow
11 them to say Acorn Winery or Acorn. And so before we did
12 that, we had to say Acorn Sellers or Acorn Geyserville or
13 something else.

14 Q. You had to create a separate --

15 A. We had to make up a variation on the theme.

16 Q. Gotcha. So this use allowed you with more
17 ease to place the Acorn Winery on the back of the bottle
18 essentially?

19 A. Right.

20 Q. If it's all right with you, I'm really close
21 to being finished. I think we can plow through and not
22 break for lunch. Would that be fine with everyone?

23 MR. OWEN: Sure.

24 MR. ROMERO: Q. Who selected the Acorn mark?

25 A. My wife and I.

1 Q. How did you come by that decision?

2 A. I don't exactly remember. I came up with the
3 name, and I remember talking to her about it, and I remember
4 talking to my father-in-law about it, but it kind of came
5 out of the blue. It was no -- we didn't hire anyone to find
6 a -- no research went into it.

7 Q. You didn't have any other businesses operating
8 under that name or?

9 A. No.

10 Q. When did you first come up with the mark?

11 A. Well, my recollection is we were discussing it
12 in as early as June of 1993. I think we said it in the
13 answers to one of the interrogatories fall of 1993, but I
14 think it was actually earlier, and you probably read some of
15 our stuff as to why we think it's a good name.

16 Q. And your first use of the market, I do believe
17 you indicated sometime fall of 1993; what was the first use
18 of the mark?

19 A. Well, we reserved the name with the
20 corporation commissioner. We filed an intent to use, that's
21 the term, with the trademark office.

22 I guess those are the first, you know, kind of
23 constructive notice.

24 Q. When did you first use the mark in connection
25 with your lines?

1 A. Do you mean sales or putting it on the bottle
2 or --

3 Q. Let's start with putting it on a bottle.

4 A. Well, I can't remember exactly when we bottled
5 it, but our first wine with the Acorn label on it was 1994
6 Sangiovese. We didn't actually start selling it until 1996.

7 Q. So your first use as far as within commerce
8 would have been 1996?

9 Had you ever sold wines under a different mark?

10 A. No.

11 Q. And I believe you indicated that sometime in
12 August of '96 you first used the mark to interstate
13 commerce; do you recall your first --

14 A. Right.

15 Q. -- sale across the state border? What was
16 that sale?

17 A. It was a sale to an individual in Washington
18 State.

19 Q. Okay. When did you first begin selling to
20 distributors?

21 A. I can't recall. We started off -- no, I can't
22 recall. It was not -- it was later than '96.

23 Q. How many cases of wine did Acorn Winery sell
24 in 2005?

25 A. Somewhere in the neighborhood of 2500 cases.

1 Q. Did you sell more in 2004?

2 A. No. More in '05 than '04.

3 Q. Has that been a steady progression increasing
4 over the last several years?

5 A. Yes.

6 Q. Any idea how many you think you're going to
7 sell in 2006?

8 A. I think more than in '05.

9 Q. I know I'm asking a businessman.

10 A. Well, we're ahead of last year.

11 Q. Okay. Let me just look through my notes.

12 Prior to this trademark opposition action, had you
13 ever heard of Sweely Holdings before?

14 A. No.

15 Q. Had you ever heard of Acorn Hill Farms before?

16 A. No.

17 Q. Have you heard of them since?

18 A. Yep.

19 Q. To your knowledge, do you market directly in
20 Virginia?

21 A. We have customers in Virginia.

22 Q. You have customers in Virginia. All right.

23 I believe your answers indicated no distributors in
24 Virginia at this time?

25 A. That's right.

1 Q. Okay. So those would be individual customers?

2 A. Yes.

3 Q. Okay. I think I've covered everything. Let
4 me just make one last check to be on the safe side.

5 Maybe one other question to see if I can follow-up
6 on this.

7 You named at least one restaurant in Healdsburg
8 that carried the wine and that's the Zin Restaurant?

9 A. Yes.

10 Q. Are there other restaurants?

11 A. Yes.

12 Q. Can you name any of those?

13 A. Bistro Ralph, Ravenous. Charcuterie, it's a
14 French word for butcher, I think. Dry Creek Kitchen,
15 Manzanita. There are a couple more. Most of the
16 restaurants --

17 Q. Most of them are in Healdsburg?

18 A. No, most of the restaurants in Healdsburg have
19 our wine.

20 Q. Are any of the restaurants you just named in
21 San Francisco?

22 A. You mean do they have branches, no.

23 Q. Are there restaurants in San Francisco that
24 carry your wine?

25 A. Yes. We're at Cosmopolitan, One Market. I

1 think it's 1550 Hyde. Sociale, Freeson, Hog Island Oyster
2 Company. Those are the ones that I can think of.

3 MR. ROMERO: Off the record.

4 (Brief discussion held off the record.)

5 MR. ROMERO: Okay. Back on the record.

6 That's all the questions I have for this
7 deposition.

8 So we will close the deposition at this time.

9

10 (The deposition proceedings were
11 adjourned at 12:45 p.m.)

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STATE OF _____)
) SS. COUNTY OF _____

I, the undersigned, declare under penalty of perjury that I have read the foregoing transcript, and I have made any corrections, additions or deletions that I was desirous of making; that the foregoing is a true and correct transcript of my testimony contained therein.

EXECUTED this day of

at _____, _____
(City) (State)

FILE NO.: A007470

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REPORTER'S CERTIFICATE

I, CORAL COREY, CSR No. 10699, Certified
Shorthand Reporter, certify;

That the foregoing proceedings were taken before me
at the time and place therein set forth, at which time the
witness was put under oath by me;


That the testimony of the witness, the questions
propounded, and all objections and statements made at the
time of the examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and correct transcript
of my shorthand notes so taken.

I further certify that I am not a relative or
employee of any attorney of the parties, nor financially
interested in the action.

I declare under penalty of perjury under the laws of
California that the foregoing is true and correct.

Dated this Tuesday, September 5, 2006.


CORAL COREY, C.S.R. No. 10699

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October 5, 2006

Via Facsimile 800 925-5910 and U.S. Mail

Atkinson Baker, Inc.
180 Montgomery Street, Suite 800
San Francisco, CA 94104

**Re: Acorn Winery v. Sweely Holdings
Your File No. A007470
Deposition of William Nachbaur, taken on August 22, 2006**

Dear Sir/Madam:

Enclosed please find original Letter to Deposition Officer Errata Sheet in connection with the above-referenced deposition.

Very cordially,

OWEN, WICKERSHAM & ERICKSON, P.C.

By


Gregory N. Owen

Our Ref. ACORN-60001

GNO/bcd

Encl.

cc: Jason J. Romero, Esq.

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LETTER TO DEPOSITION OFFICER ERRATA SHEET

Corrections to Deposition of William Nachbaur, August 22, 2006

Acorn Winery vs. Sweely Holdings

File # A007470

the following are the corrections which I have made to my deposition transcript:

Page #	Line #	Change	To:	Reason for Correction
8	24	working	looking	wrong word
11	25	were	we	wrong word
17	6	feat	feast	wrong word
19	3	non	not	wrong word
19	6	Striker	Stryker	spelling
19	17	Ross	Lost	wrong word
21	15	Rosatto	Rosato	spelling
21	21	mostly a	a mostly	word order
21	22	Mariquetta	Mariquita	spelling
22	11	bottle	bottling	wrong word
22	15	Rosatto	Rosato	spelling
23	9	Rosatto	Rosato	spelling
27	14	Wine Berries	Wineberries	spelling
27	24	Wine Berries	Wineberries	spelling
33	25	A trade	The trade	word order
35	17	vital	viral	wrong word
36	21	.	?	wrong punctuation
40	12	Sellers	Cellars	wrong word
45	1	Freeson	Frisson	spelling

I, the undersigned, declare under penalty of perjury, that I have read the above-referenced deposition transcript and have made any corrections, additions or deletions that I was desirous of making; that the transcript contains my true and correct testimony.

EXECUTED this 27th day of September, 2006,
at Healdsburg, California

(Deponent)

